PENGARAH TANAH & GALIAN SELANGOR *a*

v.

BOHARI TAIB & ORS.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 21-20-90]
26 MARCH 1990 *b*

LAND LAW: *Occupation on land - Whether lawful - Expiry of temporary occupation licence - Law and equity - Lesco's case and Sidek's case - National Land Code 1965, ss. 48, 78.*

CIVIL PROCEDURE: *Recovery of possession of land - Whether disclosed cause of action - Failure to identify occupiers - Locus standi - Failure of defendants to file affidavits - Late filing of affidavits - Rules of the High Court 1980, O. 89.* *c*

On 16 October 1986, the State Government of Selangor decided to develop the said land into a resettlement area and authorised FELCRA to develop the said land, FELCRA claims they have been obstructed by the defendants and other unidentified illegal occupants from doing so . The plaintiff on behalf of the Selangor State Government, sought recovery of possession of the said land under O. 89 of Rules of the High Court 1980 (RHC). *d*

M (who was not one of the named defendants, and who had filed a civil action on 20 March 1990 in relation to identical issues as in this case) filed an affidavit in opposition to this application on behalf of himself and 542 others; a preliminary objection was taken that the affidavit of A did not comply with O. 89 r. 3 as he had failed to disclose the circumstances in which the defendants had come to be in occupation of the said land; further that the plaintiff had no *locus standi* because he had not shown a right to possession since it was FELCRA that was being obstructed; also that the plaintiff did not state the actual identities of the persons in occupation. The issue for the Court was whether the defendants were in unlawful occupation; the defendants claiming that in law and in equity, they are entitled to be in possession. *e*

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Held:

[1] (a) The preliminary objection as to the failure to name the persons in occupation was totally devoid of any merit.

(b) The supporting affidavit fully complied with the requirements of O. 89 r. 3 as in the absence of that knowledge there is no necessity for the plaintiff to state when or how the defendants came to first occupy the land. *g*

(c) what must be said is that they are in illegal occupation when the application is made - to say a person is unidentified and to say his name is not known, is the same thing. The contention that A was deposing to hearsay evidence in referring to the defendants as the occupants in question was especially misconceived because the occupants were in fact before the Court, and had joined issue. *h*

(d) As for *locus standi* FELCRA was authorised to go in on behalf of the plaintiff. The paramount title to the land therefore was always vested in the plaintiff.

[2] (a) In cases of this kind where the plaintiff is the legal owner of land, and is alleging that the defendant are in unlawful possession of his land, the onus is upon the defendants to show they have a legal right to be there; *i*

(b) It is significant that none of the six named defendants in this case have filed any affidavits;

(c) the evidence of one K telling certain persons that they would be granted temporary occupation licences for the first 3 years and thereafter separate titles, is crucial evidence but is pure hearsay - there is no explanation as to why K did swear an affidavit; standing alone, or even taking it together with the earlier letter this was not a categoric assertion on behalf of the state executive committee that a formal decision had been taken to issue land titles to all those concerned.

[3] The Court adopted the *dicta* of Y.A. Abdoolcader in the *Lesco* case that ss. 48 and 78 of the NLC provide a complete answer to and inhibit the interpolation of any equity in regard to the respondent's claim - there can be no intervention by equity in the face of the specific legislative provisions of the NLC.

[4] In the circumstances of this action this is an abuse of process which almost tends towards an abuse of a privilege of the right of audience which we conferred on those entitled to appear before our Courts.

[Plaintiff to recover possession of the said land; writ of summons and statement of claim filed by M consolidated with this action and struck out.]

Cases referred to:

Government of the State of Negeri Sembilan & Anor. v. Yap Chong Lan & 12 Ors. [1984] 2 MLJ 123

Sidek bin Haji Muhamad and 461 Ors. v. The Government of the State of Perak [1982] 1 MLJ 313

Teh Bee v. K. Maruthamuthu [1977] 2 MLJ 7

Legislation referred to:

National Land Code 1965, ss. 48, 425, 426A

Rules of the High Court 1980, O. 89 r. 3(b)

Other sources referred to:

English Supreme Court Practice, [1988] Vol. 1, para. 113/1-8/5

For the plaintiff - Hishamuddin Yunus; Legal Advisor of Selangor (Zainur (for FELCRA) with him)

For the defendants (515 people) - Mohideen Abdul Kadeer(Meena with him); M/s. Meena, Thayalan & Partners

JUDGMENT

Mahadev Shankar J:

This is a summary proceeding under O. 89 of the Rules of the High Court 1980 for the recovery of possession of the land comprised in Lots 3806 - 4522 Mukim Sungai Panjang, Daerah Sabak Bernam (hereafter referred to as the said land).

The said land is Selangor State land. The plaintiff was at first described as the State Government of Selangor. This was a misnomer. (See definition of "state authority" in s. 2 and ss. 12 and 16 of the National Land Code and *Government of the State of Negeri Sembilan & Anor. v. Yap Chong Lan & 12 Ors.* [1984] 2 MLJ 123 at p. 126.) So the present plaintiff was substituted.

The application was supported in the first instance by an affidavit affirmed by the assistant state secretary Selangor. He deposed to the fact that he was advised and verily believed the said land was state land, and that the six named defendants and other unidentified persons are illegally occupying parts of the said land.

On 16 October 1986 the State Government of Selangor decided to develop the said land into a resettlement area and authorised the Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA) to develop the said land.

Since 11 October 1987 FELCRA had expended approximately RM657,165.40 towards this development but their efforts had been obstructed by the named defendants and other unidentified illegal occupants.

Thus the recovery of possession has been an on-going problem for the last two years and more.

On the first return date of the summons, (16 February 1990) the defendants solicitors requested for a postponement to take instructions. The State Legal Adviser did not object. So I ordered that the matter be disposed of on 12 March 1990. I also directed any affidavit-in-reply to be filed before 2 March 1990. It was not.

On 12 March 1990 defence Counsel took her preliminary objection, of which no previous notice was given to the State Legal Adviser. I upheld the objection and directed the name of the plaintiff to be changed, and fixed the case for disposal on 22 March 1990.

On 20 March 1990 one Mokhtar bin Jaafar (who is not one of the six named defendants) affirmed, filed and served an affidavit in opposition to this application. He claimed to do so on behalf of himself and 524 others who were all named in lists attached to his affidavit.

On 22 March 1990 Encik Mohideen Abdul Kadeer who now appeared as Counsel for all the 525 defendants listed by Mokhtar bin Jaafar, raised another preliminary objection. Again no prior notice had been given to the State Legal Adviser.

The objection was that the plaintiff's supporting affidavit by the assistant state secretary did not comply with O. 89 r. 3 and consequently did not disclose any cause of action. It was submitted that he had failed to disclose the circumstances in which the defendants had come to be in occupation of the said land and that consequently there was a failure to comply with O. 89 r. 3(b). It was further submitted that he had not said in so many words that he "does not know the names of the persons occupying the land who are not named in the summons", and that the plaintiff had no *locus standi* because he had not shown a right to possession since it was averred that it was FELCRA who was being obstructed.

For legal authority Encik Mohideen Abdul Kadeer relied on the commentary to O. 113 of the *English Supreme Court Practice* (1988) Vol. 1 at para. 113/1-8/5 where it says the rules must be strictly complied with, and para. 113/1-8/6 which goes to the non-necessity of taking measures to discover the actual identities of the persons in actual occupation and the need to say positively that the plaintiff does not know the names of the persons in occupation.

I overruled this preliminary objection because it was totally devoid of any merit. The supporting affidavit fully complied with the requirements of the rule. In the absence of that knowledge there is no necessity for the plaintiff to state when or how the defendants came to first occupy the land. What must be said is that they are in illegal occupation when the application is made. To say a person is unidentified and to say his name is not known, to my mind, is the same thing. The contention that the assistant state secretary was deposing to hearsay evidence in referring to the defendants as the occupants in question was especially misconceived because Encik Mohideen Kadeer's 525 clients were in fact before the Court, and had joined issue. As for *locus standi* FELCRA was authorised to go in on behalf of the plaintiff. The paramount title to the land therefore was always vested in the plaintiff. The only issue was whether the defendants were in unlawful occupation.

In cases of this kind where the plaintiff is the legal owner of land, and is alleging that the defendants are in unlawful possession of his land, the onus is upon the defendants to show they have a legal right to be there. It is significant that none of the six named defendants in this case have filed any affidavits. Out of the 525 people they represent, defence solicitors have only produced eight temporary occupation licences which expired many years ago. Some correspondence between the authorities and seven individuals have been exhibited, but by no stretch of imagination can these letters be said to confer title to the land.

Even so taking their allegations at face value and putting it at its very best for the defendants their case amounted to no more than this.

Sometime between 1952 and the early 1980s each of these defendants claims to have gone into occupation of about three acres of the said land to plant paddy.

Three T.O.L.s were produced as evidence of early settlement. One dated 25 February 1952 for three acres which expired on 31 December 1957, one dated 23 February 1960 which expired on 31 December 1960, and one issued on 30 September 1965 expiring on 31 December 1965.

Between 1971 to 1976 some of them are said to have applied for land titles but not a single document has been produced to substantiate this.

Between May and July 1977 the Pemungut Hasil Tanah Sabak Bernam sent out letters to some people. The title to this letter says, "Interview for Merbau Berdarah Land, Project Phase III (Padi Field) Mukim Sungai Panjang." The body of the letter says the addressee was required to attend an interview by the Land Committee of Sabak Bernam. Seven such letters have been produced.

On 20 October 1980 the collector sent out another round of letters. These letters were headed "Meeting for Issuance of Land at Merbau Berdarah Project for Padi Planting." It then stated that the addressees' "application for the above project has been approved by the state executive council Meeting on 4 September 1980." Again only seven such letters have been produced.

Great emphasis has been placed by Encik Mohideen on this letter. He submits that the state executive council decided at that meeting that each applicant would be granted a land title for the land occupied by him. Standing alone and reading the letter for what it is worth I am unable to see how the words can be said to carry any such meaning. Approval of an application for a project is not an approval for a grant of land title.

But Encik Mohideen ties up these letters with a meeting which followed on 1 November 1980 at which the successful applicants were to be briefed about the project. At this meeting Encik Mokhtar avers that one Datuk Haji Kamarulzaman Haji Ahmad said to be a Member of the Selangor state executive committee told those present that they would be granted T.O.L.s for the first three years and thereafter separate titles would be issued provided the applicants cultivated the said lands and had not been given any other lands.

This evidence which is so crucial to the defendants' case is pure hearsay. There is no explanation as to why an affidavit from him is not forthcoming. But again standing alone, or even taking it together with the earlier letter this was not a categoric assertion on behalf of the state executive committee that a formal decision had been taken to issue land titles to all those concerned.

Indeed the evidence is to the contrary. The next round of letters to Mokhtar bin Jaafar and the others on the subject of the Merbau Berdarah Land for Padi Planting was specifically on the applications being approved as temporary occupation licences only. The letter continued:

The consideration for the issuance of land title (grant) will be made after one year, and you are not necessarily entitled to the approval of the land title, if you fail to develop the said land.

Six such letters have been produced one dated January 1981 and five for January 1982. They clearly dispel any suggestion of a decision as at 4 September 1980 to issue land titles to all the applicants.

Thereafter five temporary occupation licences have been produced, all issued in January 1981.

The only rational inference is that each year as the T.O.L.s. came up for renewal the expectation of obtaining a grant as a matter of right must have been dispelled because none was issued.

Indeed the averment of Encik Mokhtar is that T.O.L.s were issued in 1982 and 1983 but none have been produced. However taking his words at face value it would appear that even for the Merbau Berdarah project no further T.O.L.s were issued after 1983.

The rest of the defendants, evidence is that each one continued in occupation of his respective piece of land and cultivated the same, and waited in expectation of receiving a grant for it. Between April 1988 and July 1989 it is alleged that FELCRA trespassed upon their lands and destroyed their crops. Some photographs have been attached to the affidavit but these show oil palm and banana plantations.

The basis of the defendants' claim is that in law and in equity they are entitled to be in occupation.

The defendants or at least many of them must have known of the State Government's intention when FELCRA entered the land in April 1988. That was nearly two years ago. The defendants, solicitors entered appearance on 12 February 1990. There was a gap of several weeks to the date of actual hearing. But the affidavit in opposition was not filed and served until 48 hours before the hearing. The legal advisor was thus put into an invidious position of either asking for an adjournment to file an affidavit in reply or to deny the contentious assertions in Encik Mokhtar's affidavit from the Bar Table and carry on. He chose the latter course.

In a nutshell his submission was that even if every word of the defendant's affidavit was taken at face value the defendants did not have a leg to stand on in law.

He cited the following:

(1) Sections 48, 425 and 426A of the National Land Code;

(2) *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7;

(3) *Govt. of the State of Negri Sembilan & Anor. v. Yap Chong Lan* [1984] 2 MLJ 123 (the *Lesco* case);

(4) *Rahmah binti Ali v. Govt. of Pahang,* and *Ismail bin Awang v. Govt. of Pahang* Kuantan High Court Civil Suits 436 and 456 of 1977 (Unreported);

(5) *Sidek bin Haji Muhamad and 461 Ors. v. The Government of the State of Perak* [1982] 1 MLJ 313

These cases constituted an insurmountable legal obstacle to the defendants. For the record I would respectly adopt the *dicta* of Y.A. Abdoolcader FJ in the *Lesco* case at p. 128 where he said:

> Section 48 prescribes that no title to state land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever, and s. 78(3) provides that the alienation of state land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in subs. (1) or (2), and **notwithstanding that its alienation has been approved by the state authority,** the land shall remain state land until that time. These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in regard to the respondents' claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code (*Pemungut Hasil Tanah, Kota Tinggi v. United Malayan Banking Corporation*). (Emphasis is mine).

I am bound by this decision.

The defendants' solicitors were aware of the *Lesco* case and in fact cited it at the earlier hearing. With the greatest respect to him, Encik Mohideen Kadeer's attempts to distinguish it and the other authorities aforesaid, were an exercise in futility.

The words in the *Lesco* case were plain enough. Two years earlier the legal position in cases like this were made so crystal clear by DYMM the Yang di-Pertuan Agong as he now is, that it should have penetrated any capacity of vision or reasoning self-induced or otherwise. His Majesty said in *Sidek bin Haji Muhamad & Ors. v. Government of Perak* [1982] 1 MLJ 313 at p. 314.

> The only way to obtain state land is by way of the National Land Code. The case falls within the broad principle that "where an Act creates an obligation, and empowers the obligation in a specified manner, we take it as a general rule that performance cannot be enforced in any other manner: (see *Doe d. Rochester (Bp.) v. Bridges*). Likewise here in the case of landless. It cannot have been intended by Parliament in enacting the National Land Code that every person who was in need of land should be able to sue the government for it or to take the law into his own hands for the purpose. So the Courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellants find themselves. But we can go no further. They must make their appeal for help elsewhere, not to us.

When the defences taken in this case were so absolutely sterile one needs to ask why they were solemnly put forward by officers of this Court whose duty is to advise their clients on what the law is and not what in their or the clients' opinion it ought to be. Failure to give advance notice of legal points intended to be taken may be minor misdemeanours not in the best of the traditions of the Bar. But filing legal proceedings for relief where it is obvious that none exists is quite something else.

On 20 March 1990 the defendants' solicitors have filed a civil action in this very Court where the identical issues are being agitated by the same Mokhtar bin Jaafar and one Mat Jani bin Ali Gasan (suing on behalf of themselves and all other persons in occupation of portions of the said land). Mat Jani's name is No. 58 in the Mokhtar's list under Block E in the proceedings before me.

In the circumstances of this action this is an abuse of process which almost tends towards an abuse of a privilege of the right of audience which we confer on those entitled to appear before our Courts.

There are of course powerful mitigating factors.

The defendants can say that they were landless people to start with, that the land they now occupy was there doing nothing when they went into occupation, and that it was as a result of their sweat and toil that it was turned into agricultural land which has now become their kampong, and they are not prepared to be turned out of it.

But with the law being so clearly what it is, the legal champions who espouse such causes would do better to focus their powers of persuasion on other aspects of the socio-economic process. This they can do by helping to put the problem in its correct perspective, avoid stirring up useless conflicts, and help to preserve social stability whilst striving for the greatest good for the greatest number.

So far as the present case is concerned I regret to say that the defendants' difficulties cannot be relieved in this Court. I view their plight with profound sadness and pray their human problems will meet with humane solutions.

This Court can only act as the law dictates. I accordingly make an order that the plaintiff do recover possession of the whole of the land comprised in Lots 3806-4522 Mukim of Sungai Panjang Daerah Sabak Bernam against the defendants and all those other persons in occupation thereof against whom the plaintiff chooses to enforce this order.

I also order that the writ of summons and statement of claim filed by the defendants' solicitors in this Court on 20 March 1990 be consolidated with this action and be struck out forthwith.

Also found at [1991] 1 CLJ 781